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IN THE

Supreme Court of the United States

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

vs.

RUSSELL RICHARD DODSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE

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QUESTION PRESENTED

1. In the event that the Court finds that public defenders act under color of state law for purposes of 42 U.S.C. §1983 and that they are not absolutely immune from liability, is a grant of qualified immunity with a good faith standard necessary as a matter of public policy?

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INTEREST OF AMICUS CURIAE

The interest of the Minnesota State Public Defender arises from the fact that it is subject to similar suits and its liability under 42 U.S.C. §1983 will be determined by the Court's holding in this case.

STATUTE INVOLVED

42 U.S.C .§1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state

> or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

ARGUMENT

IF THE COURT FINDS THAT PUBLIC DEFENDERS ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF 42 U.S.C. §1983 AND THAT THEY ARE NOT ABSOLUTELY IMMUNE FROM LIABILITY, A GRANT OF QUALIFIED IMMUNITY WITH A GOOD FAITH STANDARD IS NECESSARY AS A MATTER OF PUBLIC POLICY.

42 U.S.C. §1983 does not provide immunity to any individual found to be acting under color of state law. Section 1983 imposes liability upon "[e]very person." However, the United States Supreme Court has, on a number of occasions, held certain public servants either absolutely or qualifiedly immune from suit under this section. The Court has found judges and prosecutors among other officials to be absolutely immune. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Pierson v. Ray*, 386 U.S. 547 (1967). It has found qualified immunity for various public officials. *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state hospital superintendent); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board member); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state executive officers); *Pierson v. Ray*, 386 U S. 547 (1964) (police officers).

The Supreme Court, in addressing the issue of immunity under §1983, has traditionally inquired into the common-law immunity accorded the public servant involved and then reviewed the policy interests warranting the immunity. If the Court found that public policy considerations justified a grant of immunity, it determined whether full or qualified immunity was appropriate. Because the public defender has so recently arrived upon the scene, there is no common-law history to examine. Consequently, the immunity question must be determined solely by an inquiry into public policy.

The two most compelling policy reasons for extending qualified immunity are (1) the public interest in recruiting and retaining competent and vigorous attorneys to represent indigents, a concern expressed by this Court in *Ferri v. Ackerman*, 444 U.S. 193 (1979); and (2) the public interest in encouraging public defenders to exercise their best judgment with discretion to make such decisions as to decline to press the frivolous, to assign priorities between clients and to make decisions in the best interests of each client. *Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976) cert. denied 429 U.S. 1102 (1977).

Other related concerns include (1) the public interest in avoiding diversion of public defender time and energy into defending malpractice suits, especially in light of the time problem already existing in most defender offices, and, as the Eighth Circuit observed, (2) the incongruity of granting "such immunity to other public servants . . . who regularly exercise their discretion in ways that touch upon constitutional rights, and [yet denying] this protection to public defenders." *Polk County v. Dodson*, 628 F.2d 1104, 1108 (8th Cir. 1980).

In evaluating these public policy interests, the special circumstances under which public defenders often operate must also be considered. These special circumstances include (1) heavy caseloads, (2) inability to choose which potential clients to represent, (3) monetary compensation less than that of the private bar, (4) less adequate resources in terms of libraries, investigators, witness costs, and staff, and (5) greater exposure to suit for malpractice due to potential liability under 42 U.S.C. §1983.

In *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979), the United States Supreme Court acknowledged that valid public policy reasons might justify an immunity for appointed counsel. *Ferri* dealt with the narrow issue of whether an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is, as a matter of law, entitled to absolute immunity in a legal malpractice action in the state courts. The Court held in the negative. The Court however, also stated that "[p]erhaps the most persuasive reason for creating an immunity would be to make sure that competent counsel remain willing to accept the work of representing indigent defendants" and noted that "[i]f their monetary compensation is significantly less than that of retained counsel, and if the burden of defending groundless malpractice claims and charges of unprofessional conduct is disporportionately significant, it is conceivable that an immunity would be justified. . . ." 444 U.S. at 204-205. Certainly these two concerns apply equally to court-appointed counsel and all other public defenders.

In *Polk County v. Dodson*, 628 F.2d 1104, 1111 (8th Cir. 1980), Judge William A. Overton pointed out in his dissenting opinion that public defenders are "notoriously

overworked and underpaid."[1] In addition, there are statistics which lend substantial support to the contention that public defenders will, in all likelihood, be forced to defend a disproportionate number of suits charging inadequate representation if they are open to suit under §1983 and granted no immunity. Filings by state prisoners in civil rights cases have increased dramatically since 1970.[2] In *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976), this Court stated that §1983 suits against prosecutors without full immunity "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." Since prosecutors are fully immune, the unhappy defendant may well turn his attention to his state-paid attorney who comes to him clothed in the authority of the state and whose services he has little choice but to accept. Under these circumstances qualified immunity is certainly required and is in no way prohibited by the Court's holding in *Ferri*.

Additionally, if the state, itself, provides a procedure within the context of the criminal system to obtain relief for a reversible error made by an attorney, then there is no need to impose any liability upon the attorney as there would be no damages. For example, in Minnesota every convicted defendant has the right to at least one state corrective process designed to afford review of claimed

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[1]The compensation for court appointed public defenders in the federal courts has not changed since 1970. 18 U.S.C. §3006A(d).

[2]The increase in filings since 1970 has been 451.5%. The Reports of the Judicial Conference - Report of the Administrative Office, U.S. Courts, 1979, at 221-222. In Minnesota, prisoners are monitoring this type of litigation closely. See, Waletski, Everyone But Public Defender is Immune, Pillar, Vol. 80, No. 6 (Inmate Newspaper of the Minnesota Correctional Facility at St. Cloud, Minnesota) at 7.

violations of the Federal or State Constitutions or of state law. *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976); Cf. *State v. Ray*, 273 N.W.2d 652 (Minn. 1978). Thus, even if a defendant fails to file a timely appeal, he still has the right to a post-conviction review of his claim. Under these circumstances, any reversible wrong may be quickly corrected within the system and there will be infrequent instances in which any need will exist for a remedy in the federal courts under 42 U.S.C. §1983.

CONCLUSION

In conclusion, amicus curiae, Minnesota State Public Defender, respectfully requests that if the Court finds that public defenders act under color of state law and that they are not absolutely immune under 42 U.S.C. §1983, that the Court grant public defenders a qualified immunity based upon a good faith standard as defined in the decision of the Eighth Circuit Court of Appeals. *Polk County v. Dodson*, 628 F.2d 1104, 1107-8 (8th Cir. 1980).

Respectfully submitted,

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